

16.6 NEUTRAL EVALUATION.

(A) GENERAL RULES.

(1) Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 et seq., this Rule provides parties to civil cases in the District of Montana with an opportunity to use neutral evaluation. This Rule is intended to reduce the financial and emotional burdens of litigation and to enhance the Court's ability to timely provide traditional litigation services.

(2) Neutral evaluation is a procedure in which the parties and their counsel, in a confidential session, present summaries of their cases to an experienced and impartial lawyer, judge, retired judge, or other qualified person who evaluates the parties' legal positions and provides the parties and their counsel with a non-binding evaluation of the case. The evaluator may also help the parties identify areas of agreement, provide case-planning guidance, and, if requested by all parties, assist in negotiating a settlement of the dispute.

(3) Except for cases exempted by L.R. 16.6(A)(4), all parties must consider early neutral evaluation, pursuant to L.R. 16.6(B). Any of the parties may jointly request neutral evaluation of any or all claims or defenses at any time. It is unnecessary that all parties agree to neutral evaluation of all claims or defenses for neutral evaluation to occur in a case. For instance, co-defendants may choose to submit cross-claims between them to neutral evaluation, or a plaintiff and one defendant may choose to submit the claims between them to neutral evaluation. However, it is recommended, to the extent possible, that all claims and defenses in a case be submitted to neutral evaluation at one time. All motions for neutral evaluation must conform to the provisions of L.R. 16.6(B)(5).

(4) This Rule applies to all civil cases pending before any district judge or magistrate judge in this District except the following actions or claims:

- (a) appeals from proceedings of an administrative agency of the United States;
- (b) foreclosure;
- (c) proceedings under the Bankruptcy Code (Title 11 of the United States Code) and appeals from the Bankruptcy Court;
- (d) debt collections by the United States (e.g., student loans);
- (e) requests for temporary restraining orders or preliminary injunctions, including fraud injunctions under 18 U.S.C. § 1345;
- (f) any case in which one or more parties appear pro se;
- (g) petitions for writs of habeas corpus or prisoner civil rights actions;

- (h) cases challenging the constitutionality of a statute;
- (i) civil rights claims against federal employees; and
- (j) Freedom of Information and Privacy Act matters.

The preceding actions or claims may be submitted to early neutral evaluation if the parties so agree. The judge assigned to the case may compel early neutral evaluation or neutral evaluation at any stage of the proceedings in all cases and for all claims.

(5) The parties may seek alternative dispute resolution services outside the Court's program. The enforcement, immunity, and other provisions of this Rule will not apply to outside services.

(6) Confidentiality.

- (a) Except as provided in this Rule, and except as otherwise required by law or as stipulated in writing by all parties and the neutral, all communications made in connection with any evaluation proceeding under this Rule shall be confidential.
- (b) Except as provided in this Rule, and except as otherwise required by law or as stipulated in writing by all parties and the neutral, no person may disclose to the assigned judge any communication made, position taken, or opinion formed by any party or neutral in connection with any proceeding under this Rule.
- (c) Participants and neutrals may respond to an appropriate request for information by persons authorized by the Court to monitor or evaluate any aspect of the Court's program or to enforce any provision of this Rule. The identity of the sources of such information shall be protected.

(B) MANDATORY CONSIDERATION OF EARLY NEUTRAL EVALUATION.

(1) Conference and Report.

- (a) At the Rule 26(f) conference, or as otherwise directed by the presiding judge, the parties must consider whether they might benefit from participating in early neutral evaluation.

- (b) If the parties agree that early neutral evaluation is appropriate, they shall also discuss when the evaluation should occur and who should be appointed as a neutral. The parties must attempt in good faith to jointly nominate a neutral.
- (c) Within ten (10) days after their conference, or in the preliminary pretrial statement, the parties shall report, jointly or separately, their views about early neutral evaluation, scheduling, and nomination of an evaluator. Counsel who decline early neutral evaluation must certify that they understand the early neutral evaluation procedure, have explained it to their clients, and have carefully considered it with their clients. Counsel who recommend early neutral evaluation must include a motion for evaluation with their report.

(2) If all parties agree that early neutral evaluation is appropriate, the assigned judge shall order early neutral evaluation. If the parties disagree, the judge may order early neutral evaluation. The preliminary pretrial conference will proceed as scheduled regardless of whether a case is referred for early neutral evaluation.

(3) The judge assigned to the case will ensure that referral to neutral evaluation does not impose an unfair or unreasonable economic burden on any party.

(4) Assigned Judge's Continuing Responsibility for Case Management. Neither the parties' agreement to participate in neutral evaluation nor referral of an action shall reduce the assigned judge's power and responsibility to maintain control of a case before, during, and after the evaluation process.

(5) Motions and Orders for Evaluation.

(a) A motion for evaluation must:

- (1) identify by name and organizational affiliation the available neutral nominated to serve in the case;
- (2) state the proposed rate of compensation for the neutral, terms of reimbursement of the neutral's expenses, and any proposed limitations on compensation or expense reimbursement;
- (3) specify the time frame within which neutral evaluation will be completed and the specific date by which the neutral must file written confirmation of that completion;
- (4) specify the date by which the parties must notify the Court and any non-participating parties, in a jointly filed statement, whether all or part of the case has been resolved; and
- (5) suggest and explain any minor modifications or additions to the case

management plan that would be advisable because of the reference to Early Neutral Evaluation.

- (b) Every order granting a motion for evaluation must specify:
- (1) the identity of the neutral who will serve in the case;
 - (2) the rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any limitations on compensation or expense reimbursement;
 - (3) the date by which the proceedings must be completed and by which the neutral must file a confirmation of that completion;
 - (4) the date by which the parties must notify the Court, in a jointly filed statement, whether all or part of the case has been resolved; and
 - (5) any pretrial activity, e.g., specified discovery or motions, that must be completed before the evaluation session is held or that is stayed until the session is concluded.
- (c) In fixing deadlines in its Order of Reference, the assigned judge will assure that the time allotted for completing the process is no more than is appropriate and that the referral does not delay case development, motions, or trial.

(C) NOMINATION AND APPOINTMENT OF NEUTRALS.

(1) Unless otherwise directed by the assigned judge, the parties may nominate a neutral who is not on the panel. The parties shall submit with their report on neutral evaluation written agreements, signed by counsel for each participating party and the nominee, stating that neutral evaluation shall occur within a specified time frame. Faxed documents may be attached to the report if paper copies are simultaneously mailed to the Clerk of Court for filing.

(2) If the parties agree on a neutral, the assigned judge will appoint the parties' nominee unless the nominee is disqualified or otherwise precluded from serving.

(3) If the parties cannot agree on a neutral, the assigned judge will appoint an available neutral from the panel.

(4) The Clerk of Court shall serve orders of appointment on all counsel in the case and on the appointed neutral.

(5) Within seven (7) calendar days after the neutral is appointed, the participating party whose name appears first in the caption of the case shall provide the neutral with a copy of:

- (a) the order of reference;
- (b) each party's most recent pleading; and
- (c) any other order or document from the court file that sets forth requirements or stipulations related to the evaluation.

(D) PROCEDURE FOR EVALUATION SESSIONS.

(1) Telephone Conference with Neutral. Promptly after being appointed to serve in a case, the neutral shall hold a brief joint telephone conference with all participating counsel to discuss:

- (a) a date and place for the session;
- (b) the procedures that will be followed during the session;
- (c) the identity of those who will attend on behalf of each party;
- (d) what material or exhibits should be provided to the neutral before the session or brought by the parties to the session;
- (e) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements;
- (f) page limitations for the pre-session statements; and
- (g) any other matters that might enhance the utility of the evaluation.

(2) Pre-Session Statements.

- (a) No later than ten (10) calendar days before the first evaluation session, each party must serve on all other participating parties and deliver directly to the neutral a written pre-session statement.
- (b) The parties' written statements must not be filed and the assigned judge shall not have access to them.
- (c) Unless otherwise approved by the neutral during the telephone conference under subparagraph (1), each statement must:

- (1) identify by name and title or position:
 - (i) the person(s) with decision-making authority who, in addition to counsel, will attend the session on behalf of the party; and
 - (ii) person(s) connected with a party opponent, if known, whose presence at the session might substantially improve the productivity of the proceeding;
- (2) describe briefly the substance of the litigation, addressing key liability and damages issues and discussing the most significant evidence;
- (3) identify any discovery or motion activity that is likely either to significantly affect the scope of the litigation or to enhance the parties' ability to assess the case's settlement value or, for other reasons, to improve prospects for settlement;
- (4) describe the history and current status of any settlement negotiations; and
- (5) identify any other considerations, and set forth any additional information that the party believes might enhance the utility of the session.

(3) Attendance at the Evaluation Session.

- (a) Unless excused under subparagraph (c), the following persons must attend the evaluation session in person:
 - (1) lead counsel;
 - (2) persons having authority to settle the case and to pay the last written demand for settlement; and
 - (3) all persons whose agreement is necessary to settle the case.
- (b) Additionally, corporations or other nongovernmental entities must be represented by at least one person, other than outside counsel, who is knowledgeable about the facts of the case.
- (c) Government personnel who are described in subparagraph (3)(a)(2) and (3) of this Rule may petition the judge assigned to the case to participate telephonically or to be excused from the session. Subparagraphs(3)(d) and (e) do not apply to such government personnel.
- (d) All requests to be excused from participation in person must be discussed at the telephonic conference with all participating parties and the neutral. Excuses may

be granted by the neutral only upon a showing that personal attendance would impose a serious and unjustifiable hardship. All excuses granted by the neutral must be submitted by the neutral to the assigned judge for approval.

- (e) Every person who is excused from attending a session in person must participate by telephone or video, unless otherwise directed by the neutral.

(4) Neutral's Report. No more than seven (7) calendar days after the evaluation session has been completed, and by the deadline fixed in the Order of Reference, the neutral must present to the Clerk of Court a report stating only the date on which the parties completed the process. The Clerk of Court shall file the report and serve a copy on all parties to the case.

(5) Parties' Report. By the deadline fixed in the Order of Reference, the parties must jointly file a statement in which they report to the assigned judge:

- (a) whether they have settled all or part of the case; and
- (b) any proposals in which all parties join for case development, or further exploration of settlement.

(E) RULES GOVERNING NEUTRALS.

(1) Criteria for Inclusion on the Panel of Neutrals. In order to qualify for appointment to the Court's panel of neutrals, an applicant must certify that he or she:

- (a) has been a member in good standing of the State Bar of Montana or other state bar association, or has practical experience in and knowledge of a specified subject matter;
- (b) has taken the oath in 28 U.S.C. § 453;
- (c) agrees to abide by the disqualification rules of 28 U.S.C. § 455;
- (d) agrees to permit participants to inform the Court about the conduct of the process; and
- (e) agrees to respond appropriately to questions and suggestions from the Court.

(2) Disqualification of Neutrals.

- (a) No person may serve as a neutral in proceedings under this Rule in violation of:
 - (1) the standards set forth in 28 U.S.C. § 455;

- (2) the Montana Rules of Professional Conduct; or
 - (3) any additional standards adopted by the Court or the assigned judge.
- (b) A neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the assigned judge a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).
- (c) If a neutral discovers a circumstance that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the neutral must promptly disclose that circumstance in writing to all counsel and to the assigned judge. A party may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a). Any such waiver must be in writing and must be served on counsel for participating parties and filed within ten (10) calendar days of the neutral's notice of a possible basis for disqualification.
- (d) ***Objections Not Based on Disclosures by Neutral.***
- (1) **Peremptory Strike.** Where the parties did not agree on a neutral, each party may strike one appointed neutral. The party need not state a basis for its strike. A strike must be served on participating parties and filed, under seal, within seven (7) days of the neutral's appointment.
 - (2) **Objections for Cause.** Within seven days of a neutral's appointment, a party who objects for cause to service by that neutral must serve on participating parties and file, under seal, an objection stating why the appointed neutral should not serve. Any participating party may respond, under seal, to the objection within seven (7) calendar days thereafter. Promptly after the close of the period for responses, the assigned judge shall either order that the proposed neutral will serve or shall appoint another neutral.

(3) Compensation of Neutrals. Neutrals shall be compensated by the parties at a rate to which all parties agree. The neutral must disclose in writing to the assigned judge, before the evaluation session is held, all the fee, expense, and reimbursement terms and limitations that will apply to the service by that neutral. Actual transportation expenses reasonably incurred by neutrals must be reimbursed by the parties. Any neutral may voluntarily serve on a pro bono basis.

(4) Immunity of Neutrals. All persons serving as neutrals under this Rule are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

(F) VIOLATIONS.

(1) Allegations. An allegation that any person or party has materially violated this Rule must be presented in writing, under seal, directly to the Chief District Judge. Copies of any such allegation must be sent to all counsel of participating parties and the neutral at the time they are presented under seal to the Chief Judge. Any such allegation must be accompanied by a competent declaration and must not be filed. If the case is assigned to the Chief District Judge, then the allegation must be presented to the next most senior full-time district judge, or, if none, to the most senior magistrate judge who has not been involved in the case.

(2) Proceedings to Respond to Allegation. Upon receipt of an appropriately presented and supported allegation of material violation, the judge presiding over the allegation shall determine whether the matter warrants further proceedings. If further proceedings are warranted, the presiding judge shall issue an order to show cause why sanctions should not be imposed. Any such proceedings and orders shall become part of the record of the case but shall be kept under seal. The presiding judge shall afford all interested persons an opportunity to be heard before deciding whether to impose a sanction. The confidentiality provisions of L.R. 16.6(A)(6) apply to all such proceedings.